BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Northern District of Illinois, Eastern Division, is not reported but appears in the record at pages 81 to 84 and in the appendix to petition for certiorari at pages 59 to 63. The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 114 F. (2d) 916.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. A. 347 (a). The date of the judgment sought to be reviewed is July 23, 1940. (R. 112) A rehearing was denied on October 1, 1940. (R. 113)

QUESTION PRESENTED.

Is the commerce clause of the Federal Constitution violated by the levy by the State of Illinois of a Retailers' Occupation Tax measured by the receipts from a sale to a railroad of goods which are required, by the contract of sale, to be shipped via such railroad to a foreign state to be there used or consumed?

STATUTES INVOLVED.

Section 2 of the Retailers' Occupation Tax Act (Section 441, Chapter 120, Illinois Revised Statutes, 1937), provides as follows:

> "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of two per cent (2%) of the gross receipts from such sales in this State of tangible personal property made in the course of such business upon and after the taking effect of this Act and prior to July 1, 1935, and at the rate of three per cent (3%) of the gross receipts from such sales on and after July 1, 1935, and prior to February 15, 1939, and two per cent (2%) of the gross receipts from such sales after February 14, 1939. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State."

Section 12 of the Act (Section 451, Chapter 120, Illinois Revised Statutes, 1937), provides in part:

> "The department [of Finance] is authorized to make, promulgate, and enforce such reasonable rules and regulations relating to the administration and enforcement of the provisions of this Act as may be deemed expedient."

STATEMENT OF THE CASE.

In the reported opinion of the Circuit Court of Appeals that Court has set forth, concisely and accurately, the transaction upon which the tax is sought to be imposed, as follows:

> "The facts are not disputed. The debtor was engaged in selling tangible personal property

for use or consumption. It is an Illinois corporation with its main place of business in Chicago. The railroad companies to whom the sales in question were made had offices and freight stations in that city. The transactions of sale were all similar, and Exhibit 1, which is an order for paint, is typical. That exhibit was a written order placed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as the Railroad) with the debtor for nine drums black locomotive finishing paint, in 55 gallon, one-time containers, at $1.10 per gallon, f.o.b. Chicago. The order requested the debtor to ship the order to the Railroad, care of storekeeper (consignee) 1029-183, (Destination) Milwaukee Shops, Wisconsin, via the Railroad, junction nearest point of shipment, unless otherwise specified. The routing instructions contained the following: 'Deliver to C. M. St. P. & P. R. R. Freight Station.' The order further stated that the receipted bill of lading must accompany the invoice and be sent to the purchasing agent, and that the seller should strictly comply with all instructions and specifications.

"The debtor complied with the order in all respects and delivered the paint properly consigned to the consignee at Milwaukee, to the freight station of the railroad named, together with a standard form of bill of lading prescribed by the Interstate Commerce Commission. It was receipted by the freight agent, and a copy given to the debtor and the shipment was handled precisely as it would have been handled had the consignee been a purchaser other than the Railroad, that is to say, a way bill was issued in accordance with the bill of lading, the paint was placed in the car and transported directly to the destination at Milwaukee, Wisconsin. This method of sale and delivery had been pursued by the parties in precisely the same manner for twenty-four years."

S. L. Nudelman, as Director of Finance, in reorganization proceedings of the petitioner pending in the District Court of the United States for the Northern District

of Illinois, under Section 77B of the Bankruptcy Act, as amended, filed a claim for Retailers' Occupation Tax measured by the gross receipts from sales as typified by the above transaction. The controversy arose upon objections to such claim filed by the respondent. The District Court denied said claim of petitioner and the order of the District Court was affirmed by the Circuit Court of Appeals.

ARGUMENT.

In the written memorandum of the District Judge, which appears on pages 59 to 63 of the petition (R. 81 to 84) attention is called to the following provision of the official rules issued by the Department of Finance of the State of Illinois:

> "The tax does not extend to gross receipts from sales in which the seller is obligated under the terms of the agreement to make physical delivery of the goods sold from a point in the State to a point outside the State. Nor does the tax apply to receipts from a sale where the seller, by carrier or by mail, delivers the goods sold from a point in this State to a point outside the State, on order of the buyer. It is immaterial whether the goods are sold f.o.b. origin or f.o.b. destination."

Such rule was promulgated pursuant to the Retailers' Occupation Tax Act. Section 451, Chapter 120, Illinois Revised Statutes, 1937. This provision has not been changed and is still in effect.

The foregoing long-established rule serves as a conclusive answer to the petitioners' "Reasons Relied on for the Allowance of the Writ."

Pages 9 and 10 of the Petition Considered.

Petitioner's first contention is that the Circuit Court of Appeals decided an important question of local law in a way probably in conflict with a state statute because, when, considering the applicability of the Occupation Tax to the type of sale here involved, it stated: "In the instant case, we think it makes no difference when the

U.S. SUP. CT. RECORDS & BRIEFS

Information Handling Services

NUDELMAN, DIRECTOR OF FINANCE OF ILLINOIS V. GLOBE VARNISH CO.

1940-C.D.

312 U.S. 690

No. 662

CARD 2 of 2

titled passed, * * *." Petitioner then asserts that the refusal of the Circuit Court of Appeals to rely on passage of title as the determining factor in determining the applicability of the Retailers' Occupation Tax Act conflicts with the definition in the Act of a "sale at retail." This strained effort to find a conflict with a state statute must be unavailing for the above-quoted rule expressly recognizes that technical considerations of passage of title do not affect the question of liability for the tax.

Pages 11 and 12 Considered.

Petitioner asserts that the decision of the Circuit Court of Appeals is in conflict with and nullifies the so-called uniformity clause of the Illinois Constitution. It is also said that an important question of local law has been decided in a way probably in conflict with applicable local decisions.

To support these contentions, petitioner refers to Illinois cases holding that statutory attempts to exempt sales by specific classes of retailers from the operation of the Retailers' Occupation Tax Act violate the State Constitution. Petitioner then says that the decision below "has the effect of exempting from the Act * * * the sale of tangible personal property at retail to railroads." This statement is, of course, incorrect since the court below was concerned only with a particular type of sales to railroads, *i. e.,* those in which the purchase order specifies an out-of-state destination. But what is more, the decision below by no means created an exemption; instead, it enforced uniformity by applying to sellers to railroads the Department rule applicable to all other retailers:

> "Nor does the tax apply to receipts from a sale where the seller, by carrier or by mail, delivers the

goods sold from a point in this State to a point outside the State, on order of the buyer."

The quoted provision applies literally to the facts of the sales transaction here. Petitioner has sought to penalize the respondent for failing to make the delivery "by carrier" over another railroad than that operated by the buyer. The Circuit Court of Appeals has held that the identity of the carrier is not controlling. The result is that all sellers are treated alike, as is required by Article IX, Section 1 of the Illinois Constitution.

Pages 12 and 13 Considered.

Under Point 3 petitioner asks this Court to decide the important question as to whether a state of origin may, under the Federal Constitution, impose a sales tax (or its equivalent) on interstate sales. As shown by the express terms of the rule of the Department of Finance already quoted, *no attempt has been or is now made to tax receipts from interstate sales where Illinois is the state of origin.* Whether an attempt to tax such sales should be made is purely a question of local policy. Under such circumstances it is not appropriate that the question now urged by the petitioner be decided on this record.

Pages 14 to 16 of Petition and Pages 23 to 44 of Brief Considered.

Under point 4 petitioner sets forth six propositions of law with citations of authorities in support of his contention that the Circuit Court of Appeals has decided this case in a way probably in conflict with applicable decisions of this Court. Pages 23 to 44 are devoted to a detailed discussion of these cases.

Under the rules of this Court it would be improper for

respondent to file a brief of the length required to discuss each of these cases. Our argument on this point will, therefore, be confined to recent cases, which we submit are in harmony with the decision of the Circuit Court of Appeals.

It is not necessary that the goods be delivered by the seller to an independent common carrier for transportation to the buyer beyond the boundary of the state of origin to constitute interstate commerce.

In the recent case of *Southern Pacific Co.* v. *Gallagher,* (1939) 306 U. S. 167, 177, 83 L. ed. 586, 593, this Court recognized that goods being transported under circumstances identical with those in the present case were traveling in interstate commerce and were exempt from state taxation. There, the railroad had purchased goods outside of California and was transporting them on company material waybills without transportation charge to a point within California. A tax was imposed by California upon the use and storage of the goods after they reached their destination within that state. In upholding the tax, this Court said, page 177:

> "We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation."

By its emphasis on the taxable moment after the interstate movement, the Court recognized that during such movement the goods were moving in interstate commerce and not subject to state tax.

The Pipe Line Cases, (1914) 234 U. S. 548, 561-562, 58 L. ed. 1459, 1471, cited by the petitioner, are authority for the proposition that interstate commerce is involved, even where the goods being transported are the property

of the carrier, providing the transportation was part of a commercial transaction. The situation there presented by the transportation by the Uncle Sam Oil Company solely of its own oil from its own oil wells in Oklahoma to its own refinery in Kansas did not involve a commercial transaction, since the transportation *neither* began in purchase, nor ended in sale, nor was the Uncle Sam Oil Company a common carrier. The petitioner argues that the transaction has a commercial character only where the transportation begins in purchase and ends in sale, but obviously either the purchase or the sale is commerce and renders the interstate movement, of which it is an integral part, a transaction in interstate commerce.

This distinction was recently noted by this Court in *Valvoline Oil Company* v. *United States* (1939), 308 U. S. 141, 143, 145, 146, 84 L. ed. 151, 153, 154, which involved interstate transportation by the oil company to its Pennsylvania refineries of oil which it had purchased in states served by its pipe line. The oil company contended that it was not subject to the jurisdiction of the Interstate Commerce Commission. Its contention was set out in the opinion as follows (page 143):

> "Because, thus, it does not transport interstate other oil than that which it purchases at the well for its own use, Valvoline claims that it is not a common carrier of oil subject to the Interstate Commerce Act, * * *."

Despite the fact that the oil was for the company's own use and the transportation did not end in sale, the Court held that the interstate movement of the oil was commerce and pointed out that as the oil was *purchased* before transportation, the decision concerning the Uncle Sam Oil Company in *The Pipe Line Cases* was not applicable. The Court stated, pages 145, 146:

"Whether the oil so owned and transported was

ultimately used by the carrier in its own operations or sold to others was in this connection immaterial. * * * This was covered by the Pipe Line decision. There it was stated that commerce is not dependent on title, 'and *the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce.'* * * *

"The appellant relies upon the Pipe Line Cases to show that the present act does not cover a pipe line transporting oil for its own refining purposes only. The discussion referred to is that concerning the Uncle Sam Oil Company. But that company's pipe line was used for the 'sole purpose of conducting oil from its own wells to its own refinery.' This was held not to be transportation under the Act. Here, however, *it is the purchase* from many sources *and subsequent carriage that determine the applicability of the statute to Valvoline.*" (Italics ours.)

In *Northwestern Improvement Company, Petitioner,* v. *Harold L. Ickes, et al., Respondents* (1940), 111 F. (2d) 221, 223, 224, the United States Circuit Court of Appeals for the Eighth Circuit held that sales of coal to a railroad for transportation over its own line to points outside the state were transactions in interstate commerce. The petitioner sought to reverse an order of the National Bituminous Coal Commission refusing to exempt petitioner from the provisions of the Bituminous Coal Act of 1937 with respect to its sales of bituminous coal to the Northern Pacific Railway Company on the ground that such sales did not constitute interstate commerce. It appeared that after purchase, much of the coal sold was transported by the purchasing Railway Company across state lines.

The Court stated the questions involved in the following language, on page 223:

"It appears, therefore, that the controlling question presented is embodied in the following conten-

> tions of petitioner in its brief: (a) Petitioner's sales of coal to the Railway Company are purely local transactions; (b) the transportation by a common carrier railroad of its own fuel coal is not commerce; (c) the fact that the coal sold becomes an instrumentality by which interstate commerce is conducted, cannot justify the type of regulation of the terms of sale represented by the Bituminous Coal Act of 1937."

The Court cited the familiar rule that "where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation", and held that "interstate commerce includes the transactions of purchase here involved."

In holding that the transportation by the railroad of its own coal constituted interstate commerce, the Court, at page 224, discussed the case of *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, 231 U. S. 363, 58 L. ed. 269, and stated:

> "Therefore, the conclusion in that case necessarily answers the contention of petitioner that the transportation by a common carrier railroad of its own fuel is not *commerce*, and cannot justify the type of regulation prescribed by the Bituminous Coal Act of 1937." (Italics ours.)

As the buyer's state (foreign) has the right to levy an equivalent tax on the goods sold, Illinois can not validly impose a tax measured by the proceeds of the sale since this would result in two taxes upon an interstate sale as compared to one upon a local sale.

It was held in *Southern Pacific Co.* v. *Gallagher* (1939), 306 U. S. 167, 83 L. ed. 586, that where goods purchased by a carrier for its own use and transported across state lines in its own cars (under exactly the same circum-

stances as were present in the instant case) have reached the end of their interstate journey, the state of destination may impose a tax substantially equivalent in its operation to the Illinois Retailers' Occupation Tax on the use or storage of the goods in the buyer's state.

Under the principles sustained in the *Southern Pacific* case, the State of Wisconsin, or any other state of destination of interstate shipments such as those now involved, could impose a "use tax" affecting the goods subsequent to their arrival in the destination state. Such a tax might exempt from its operation goods which had previously been subjected to sales or occupation tax in the *buyer's* state, as was true under the California statute considered in the *Southern Pacific* case. This exemption from the use tax of goods already taxed locally, would result in a single tax upon intrastate sales as compared with two taxes (one in the seller's state and one in the buyer's state) upon interstate sales. Thus, there would be an actual and substantial discrimination in favor of intrastate business operating to prejudice sales involving interstate transportation.

The fact that Wisconsin, or some other buyer's state, may not have such a use tax at the present time is immaterial. This was emphasized by Mr. Justice Stone in his discussion in *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 260, 82 L. ed. 823, 831, of the Court's earlier decision in *Fisher's Blend Station* v. *Tax Commission* (1936), 207 U. S. 650, 80 L. ed. 956. In the *Fisher's Blend* case a tax measured by gross receipts derived from interstate radio broadcasting was held invalid. Mr. Justice Stone pointed out, on page 260 of the *Western Live Stock* case, in distinguishing the *Fisher's Blend* case, that a cumulative tax burden might have there resulted from the tax on ***broadcasting*** since

radio reception might also have been subjected to tax. *There was no indication that any state had as yet attempted to levy a tax on reception,* but it was noted that Great Britain levied such a tax.

Similarly, in *Gwin, White & Prince* v. *Henneford* (1939), 305 U. S. 434, 440, 83 L. ed. 272, 276, in referring to the possibility of a multiple tax burden if a tax such as there involved was held valid, the Court said, at page 440:

> "Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

In the case of *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 255, 82 L. ed. 823, 828, the tax, based upon the gross receipts from the sale of advertising space, was sustained because the Court was convinced that, under the facts there involved, the activity by which the tax was measured could not have been subjected to an equivalent imposition by any other state. The Court stated that if the business had been subject to a similar tax by other states, the New Mexico statute could not have been sustained. On page 255, the Court said:

> "The vice characteristics of those [taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, *in point of substance,* of being imposed [citing cases] or added to [citing cases] with equal right by every state which the commerce touches, merely because interstate commerce is being done,

> so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." (Italics ours.)

It will be noted that identical impositions are not required; a cumulative burden results where the taxes are equivalent in "point of substance".

The possibility of a cumulative burden upon interstate commerce influenced the decision in the case of *J. D. Adams Mfg. Co.* v. *Storen,* (1938) 304 U. S. 307, 311, 82 L. ed. 1365, 1369. In that case this Court held that the Indiana gross income tax could not legally be applied to gross receipts from transactions in interstate commerce. At pages 311-312, the Court said:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and non-discriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

Southern Pacific Co. v. *Gallagher,* (1939) 306 U. S. 167, 83 L. ed. 586, and cases such as *Graybar Electric Co., Inc.* v. *Curry,* (1939 Ala.) 189 So. 186, aff'd 308 U. S. 513, 84 L. ed. 437, and *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 84 L. ed. 565, have sustained the authority of the buyer's state to tax the sale or use of

goods which have arrived at their destination after interstate transportation. If the seller's state is also to be permitted to impose a tax having an equivalent result, a multiple burden will be imposed upon interstate commerce. At page 12 of his petition, petitioner admits what is universally recognized in practice, that the Illinois Retailers' Occupation Tax is a form of sales tax. If Illinois is permitted to impose this tax on interstate sales when it is the state of origin, a practical discrimination against interstate commerce will result.

CONCLUSION.

It is respectfully submitted (a) that this Court has no jurisdiction to entertain the petition for writ of certiorari as the petition was not filed by *any party to the cause,* and (b) that the case raises no new question of general interest but involves merely the application of settled principles of law to the facts of this case. The decision of the court below is correct. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

Marcus J. Golden,
Thurlow G. Essington,
Russell Whitman,
William P. Sidley,
Counsel for Respondent.

Hamilton K. Beebe,
Claude H. Coon,
J. Edward Day,
Of Counsel.